No. 90-5721

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PERVIS TYRONE PAYNE,
Petitioner,

v

STATE OF TENNESSEE,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF OF AMICUS CURIAE, STATE OF CALIFORNIA,

Joined by the States of Alabama, Arizona, Colorado, Connecticut, Florida, Indiana, Kentucky, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota and Washington, in support of the State of Tennessee, Respondent.

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QUESTION PRESENTED

I. Should *Booth* v. *Maryland*, 482 U.S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U.S. 805 (1989), be overruled?

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INTEREST OF AMICI CURIAE

Society in general and legislative bodies in particular have a significant interest in defining the bases upon which criminal defendants will be punished. All states attempt to make the punishment fit the crime and the offender. In California, as in other jurisdictions with capital punishment, the circumstances of the crime are a proper subject of evidence and argument in the penalty phase. They help define the extent of harm caused by the defendant. However, the harm caused by a capital murder extends beyond the historical circumstances of the offense. Society is injured and the survivors of the victim are harmed as well. Amici have an interest in insuring that the Constitution is not interpreted to preclude the full extent of the harm caused by a murderer to be considered by a penalty phase jury.

The Court's decisions in *Booth* v. *Maryland*, 482 U.S. 496 (1987) and *South Carolina* v. *Gathers*, 490 U.S. 805 (1989), limit use of victim-impact evidence in a capital trial. The Court has severely restricted the jury's consideration of aspects of the crime that deserve consideration in determining whether death is the appropriate punishment, by prohibiting the prosecution from establishing all relevant evidence for determining penalty. The result has tipped the scales of fairness against the State.

The contrast can be seen in the decisions of the California Supreme Court which have consistently followed the broad definition given defense mitigating evidence in cases such as *Lockett* v. *Ohio*, 438 U.S 586, 604 (1978) (plurality), going so far as to rule it was reversible error to refuse to admit the defendant's poetry in mitigation. (*People* v. *Harris*, 36 Cal.3d 36, 67-71 (1984) (plurality).) Amici have an interest in having the proper balance returned. The balance can be reestablished by overruling *Booth* and *Gathers*.

Additionally, amici have an interest in the establishment of clear and workable constitutional rules. The rule in *Booth* has engendered considerable confusion among prosecutors and courts concerning the permissible scope of evidence and argument involving personal characteristics of the victim. For example, the California Supreme Court has found certain evidence relevant to show the victim did not resist, because lack of resistance relates to the circumstances of the crime. (*People* v. *Carrera*, 49 Cal.3d 291, 336-337 (1989).) However, given the Court's broad reading of *Booth* in *Gathers*, and the breadth of any decision which would define any error in this case as *Booth* error, decisions like *Carrera* would be vulnerable to attack in federal habeas corpus.

Expansive interpretations of *Booth* have been advocated by counsel for capital defendants. In *People* v. *Karis*, 46 Cal.3d 612, 640, 641 (1988), the defendant argued *Booth* precluded testimony in aggravation by a victim of a prior offense committed by defendant on the ground it was inflammatory in the same way testimony by the victim's family was inflammatory. The California Court rejected this contention on the ground the impact of a capital defendant's crimes on the victims of those crimes is relevant to the penalty determination. (*Id.*, at p. 641.) Yet, similar testimony was found improper in *People* v. *Boyde*, 46 Cal.3d 212, 249 (1988), fn. 5. (aff'd on different grounds *Boyde* v. *California*, ___U.S.___ (1990), [108 L.Ed.2d 316]); see also *People* v. *Clark*, 50 Cal.3d 583, 612, 629 (1990) (admission of evidence of victim-impact held to be erroneous, but harmless, even though defendant committed crime to specifically make surviving victim suffer because of her professional status and professional relationship with the defendant).

Other states have had as difficult a time as California divining the meaning of *Booth*. (See *Gathers*, *supra*, 490 U.S. at p. 813 (O'Connor, J., dissenting); *State* v. *Huertas*, 553 N.E.2d 1058, 1070 (Ohio 1990) (Moyer

C.J., concurring) ("The fact that the majority and two dissenters in this case all interpret the opinions and footnotes in *Booth* and *Gathers* differently demonstrates the uncertainty of the law in this area.").)

SUMMARY OF ARGUMENT

A fundamental precept of justice is that the punishment fit the crime. (*Weems* v. *United States*, 217 U.S. 349, 367 (1910).) In this country, that principle has been expanded to allow the punishment to fit the crime *and* the offender. (Williams v. New York, 337 U.S. 241, 247 (1949).) The Court's decisions in *Booth* and *Gathers* prevent consideration of the full impact of a capital murderer's crime, which impacts not only the murdered individual but society and surviving family members. Thus, the picture presented to the sentencing authority in a capital case is distorted because the offense to society is never fully defined. Absent full definition of the harm caused by defendant's actions, his or her "blameworthiness" cannot be assessed.

Equally fundamental to justice is the idea that both parties are entitled to due process. (*Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934). The rule which emerged from *Booth* unfairly tips the scales in favor of the defendant in a capital penalty trial. Any aspect of the offense or defendant's character or record which the defendant wishes to offer as a basis for a sentence less than death must be received in evidence. (*Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality).) In contrast, *Booth* and *Gathers* prevent the prosecution from presenting any evidence about the victims or even arguing the "humanity" of the victims thereby exposing the jury to the full degree of harm caused by the defendant.

Society has evolved to the point where the rights of victims are recognized on an increasing basis in the

criminal justice system. *Booth* has relegated the victim of a capital crime to a faceless, undifferentiated mass contrary to evolving standards of decency. (See, *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958).) Since *Booth* is contrary to contemporary standards, this too should serve as a basis to abandon its reasoning.

The considerable confusion created by *Booth* serves as another basis for overruling the decision. (*Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986).) In footnote 10 of the opinion, the Court stated there could be situations where victim impact evidence was admissible because it related directly to the circumstances of the offense. (*Booth* v. *Maryland*, *supra*, 482 U.S. at p. 507, fn. 10.) Yet, in *Gathers* the Court held it was error for the prosecutor to argue personal characteristics of the victim which were properly admitted in evidence. (*Gathers*, *supra*, 490 U.S. at pp. 811-812.) Moreover, as noted in Justice O'Connor's dissent in *Gathers*, states have had great difficulty understanding and applying the *Booth* rule. (*Gathers*, *supra*, 490 U.S. at p. 813 (O'Connor, J. dissenting).)

The underpinnings of the *Booth* decision do not justify retention of the rule. Contrary to the assumption in *Booth*, the harm to society may be greater depending upon the characteristics of the victim. The murder of a police officer, parent or child harms society more than the murder of a drug dealing child molester.

Although a murderer may not intend to kill to harm society or the victim's survivors, his or her intent is not the only consideration in deciding the appropriateness of the death penalty. (See, *Tison* v. *Arizona*, 481 U.S. 137, 150-151 (1987) ("reckless indifference" to human life sufficient mental state to impose the death penalty).)

While the decision whether to challenge victim impact evidence may prove a tactical problem for a defendant, such difficulty does not constitute sufficient reason to create or retain the exclusionary rule of *Booth*

so long as the defendant is allowed an opportunity to rebut the evidence. (See *McGautha* v. *California*, 402 U.S. 183, 213 (1971).)

Finally, the concern that victim impact information will create distracting "mini-trials" is based on a false assumption, that is, that victim impact evidence is irrelevant. If the legislative body determines such evidence is relevant to the penalty determination, its consideration is not the least bit distracting.

Consequently, amici submit *Booth* and *Gathers* should be reexamined and overruled, as an incorrect statement of Eighth Amendment requirements.

BOOTH V. *MARYLAND* AND *SOUTH CAROLINA* V. *GATHERS* SHOULD BE OVERRULED BECAUSE THE IMPACT OF A CAPITAL CRIME ON THE VICTIM, THE VICTIM'S SURVIVORS AND SOCIETY IS PROPERLY CONSIDERED IN DETERMINING WHETHER DEATH IS THE APPROPRIATE PUNISHMENT

In *Booth* v. *Maryland*, 482 U.S. 496 (1987), the Court held it was a violation of the Eighth Amendment for a jury to consider a statutorily required victim impact statement at the sentencing phase of a capital trial. In *South Carolina* v. *Gathers*, 490 U.S. 805 (1989), the Court applied *Booth* to hold it was reversible error for the prosecutor to comment about the victim's personal characteristics in his argument to the jury. (*Booth*, *supra* at p. 507, fn. 10; *Gathers*, *supra* at p. 811.)

Amici respectfully urge the Court to reconsider and overrule *Booth* and *Gathers*. The holdings in those cases are contrary to the cornerstones of criminal sentencing jurisprudence in general and capital sentencing in particular. *Booth* and *Gathers* distort the

process by which a penalty phase jury reaches its decision by unfairly skewing the proceeding in favor of the defendant. The decisions are incapable of consistent application or definition. Moreover, the decisions deprive the legislative body of the right to define what evidence a jury should consider in determining the appropriate punishment for a person convicted of a capital offense.

A. The Punishment Should Fit The Crime

Two thousand years ago Cicero stated, "*Noxiae poena par esto*" (Let the punishment match the offense). (Cicero, *De Legibus*, III, 20.)[1] In an early interpretation of the Eighth Amendment, the Court recognized the fundamental nature of Cicero's observation when it stated, "it is a precept of justice that punishment for crime should be graduated and proportioned to offense." (*Weems* v. *United States*, 217 U.S. 349, 367 (1910).) The notion the punishment should fit the offender as well as the crime is of modern vintage. (*Williams* v. *New York*, 337 U.S. 241, 247 (1949).) Until *Booth*, severity of the crime remained a legitimate basis upon which to analyze the excessiveness of a particular sentence. (*Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.).) There is nothing inherently contradictory in fitting punishment to the crime and the

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[1]In Act II of Gilbert and Sullivan's *The Mikado*, Cicero's axiom is restated:

"My object all sublime
"I shall achieve in time--
"To make the punishment fit the crime."

offender.[2]

Society permits the ultimate punishment because of the enormity of the loss and the outrageous nature of the offense. Capital punishment is an expression of society's moral outrage at particularly offensive conduct. (*Gregg* v. *Georgia*, *supra*, 428 U.S. at p. 183 (opinion of Stewart, Powell, and Stevens, JJ).) Punishment which fits the crime is inherent in an ordered society.

> "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to

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[2]*Booth* recognized this proposition in footnote 12. (*Booth*, *supra* at p. 509, fn. 12.) Although it expressed no opinion on the use of victim impact information in contexts other than capital cases, the Court recognized the widespread use of victim information in such cases. Thus, the sentencing process in virtually all jurisdictions allows the sentencing authority to impose a punishment which fits both the crime (with full knowledge of the extent of harm caused by the defendant) and the offender.

The Court attempted to distinguish such a sentencing model from capital cases on the rationale that "death is different." Recognizing the statement as a truism, there is no legitimate reason to treat death cases differently from other criminal cases by creating a separate constitutional jurisprudence for such cases. While the Court may have good reason to examine death penalty cases closely to see that constitutional rights have not been violated, there is nothing in the Constitution which requires or allows different constitutional rules for capital cases. (See *Sawyer* v. *Smith*, 497 U.S. ___ [111 L.Ed.2d 193, 211-212] (1990) (same retroactivity rules apply to capital and non-capital habeas); *Murray* v. *Giarratano*, 492 U.S. ___ [106 L.Ed.2d 1, 10-11] (1989) (plurality) (no requirement for states to appoint counsel in state collateral review of capital cases); *Smith* v. *Murray*, 477 U.S. 527, 538 (1986) (same procedural default rules apply in capital cases as in non-capital cases).)

> believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy--of self-help, vigilante justice, and lynch law." (*Furman* v. *Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).)

The majority in *Booth* took a novel approach to the penalty equation. In analyzing the jury's penalty phase task the Court referred to the *individualized* determination whether a capital defendant should face the death penalty based on the character of the individual and the circumstances of the crime. (*Booth* v. *Maryland*, *supra*, 482 U.S. at p. 502; *Zant* v. *Stephens*, 462 U.S. 862, 879 (1983).) It expressly recognized the Court had never said the defendant's record, characteristics and the immediate circumstances of the crime were the only permissible sentencing considerations. However, other factors must be scrutinized to ensure the evidence has some bearing on defendant's "personal responsibility and moral guilt." (*Booth*, *supra* at p. 502; *Enmund* v. *Florida*, 458 U.S. 782, 801 (1982).)

The majority viewed evidence concerning the victim and the impact of his/her death on surviving family members and society in general to be irrelevant in assessing the "blameworthiness of a particular defendant" and held, subject to narrowly defined exceptions, that the prosecution may not introduce such evidence before a penalty phase jury. (*Booth*, *supra* at pp. 504, 507, fn. 10.)

The *Booth* Court spotlighted the defendant to the exclusion of the circumstances and consequences of the crime. This view of the process is distorted and must be brought back into focus. The majority's conclusion seems to be more a subjective conclusion about probative value than one supported by Eighth or Fourteenth Amendment

jurisprudence.[3]

Contrary to the *Booth* majority's unprecedented view of the jury's penalty phase task, the damage caused by a murderer is not limited to the unspeakable acts committed against the victim. "[A] victim's community is also injured, and in particular the victim's family suffers shock and grief of a kind difficult even to imagine for those who have not shared a similar loss." (*Booth*, *supra* at p. 515 (White, J., dissenting); see too, *id*. at p. 519 (Scalia, J., dissenting); *Gathers*, *supra*, 490 U.S. at p. 814 (O'Connor, J., dissenting); *Mills* v. *Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting).)

Allowing the sentencing authority to have a complete view of the damage done by a murderer's actions fulfills the policy of fitting the punishment to the crime and the offender. The prosecution should be allowed to fully define the crime so the jury may assess the relative "blameworthiness" of the defendant. In a dissenting opinion in *State* v. *Huertas*, 553 N.E.2d 1058 (Ohio 1990), a case wherein certiorari was originally granted by the Court and subsequently dismissed January 22, 1991, (*Ohio* v. *Huertas*, 498 U.S. ___ [112 L.Ed.2d 837]), Justice Resnick of the Ohio State Supreme Court

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[3]In his dissent in *Gathers*, Justice Scalia discussed the underlying basis of the *Booth* decision and concluded:

> "*Booth* has not even an arguable basis in the common-law background that led up to the Eighth Amendment, in any longstanding societal tradition, or in any evidence that present society, through its laws or actions of its juries, has set its face against considering the harm caused by criminal acts in assessing responsibility. The Court's opinion in *Booth*, like today's opinion, did not even try to assert the contrary. We provide far greater reassurance of the rule of law by eliminating than by retaining such a decision." (*Gathers*, *supra*, 490 U.S. at p. 825 (Scalia, J., dissenting).)

stated:

> "[T]he conscience of the community cannot properly be expressed if the sentencing authority lacks knowledge of the effect the defendant's crime had on the community and especially the family, friends and associates of the victim." (*States* v. *Huertas*, *supra*, 553 N.E.2d at p. 1072 (Resnick, J., dissenting).)

This Court should not preclude the sentencing authority from considering the whole of the loss.[4] The Constitution does not require the limited approach of *Booth*.

B. The People Have A Right To A Balanced Penalty Proceeding

Another cornerstone of criminal jurisprudence is the view that both sides are entitled to due process of

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[4]In fact, analysis of the loss is mandatory in capital cases. Capital punishment may not be inflicted for certain crimes because those crimes do not possess the necessary degree of injury to the person and the public. (*Coker* v. *Georgia*, 433 U.S. 584, 598 (1977) (opinion of White, J.) (rape of adult woman); *Enmund* v. *Florida*, *supra*, 458 U.S. 782, 797 (armed robbery).) However, notwithstanding the defendant's mental state, the death penalty may be constitutionally imposed on the actual killer based on the fortuity that a crime victim dies. (*Tison* v. *Arizona*, 481 U.S. 137, 148 (1987) (robbery-murder).) Victim impact does make a difference.

Furthermore, if the consequences of a crime to the immediate victim are relevant to punishment, the Constitution must not prohibit a State or Congress from attaching significance to the impact of a murder on surviving family members or society. Young Nicholas Christopher was as much a victim as his dead mother and sister. The impact of this crime on Nicholas should not be deemed irrelevant in the constitutional sense.

law. Justice Cardozo stated for the Court:

> "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." (*Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934).)

This Court has repeatedly upheld the People's right to due process. In *Fay* v. *New York*, 332 U.S. 261 (1947), in holding that a defendant is entitled to a neutral jury as opposed to a friendly jury, the Court expressly stated society has a right to a fair trial. (*Id.*, at pp. 288-289.) In repudiating the use of technical loopholes for the guilty to go free, the Court reiterated that the People of the State are entitled to due process. (*Stein* v. *New York*, 346 U.S. 156, 196-197 (1953), (overruled on other grounds in *Jackson* v. *Denno*, 378 U.S. 368 (1968).) In *United States* v. *Nixon*, 418 U.S. 683 (1974), a unanimous Court found the very integrity of the judicial system depended upon full access to evidence by either side. (*United States* v. *Nixon*, *supra* at p. 709.) The lesson is clear: hearings wherein only one side is entitled to present evidence and argument are antithetical to simple fairness.

The Court has consistently required a penalty phase jury be allowed to consider a wide range of information concerning the background of the defendant. The sentencer may not be precluded from considering, as a mitigating factor, any aspect of the offense or a defendant's character or record that the defendant proffers as a basis for a sentence less than death. (*Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality); see also *Skipper* v. *South Carolina*, 476 U.S. 1 (1986); *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982).) In California, for example, the California Supreme Court held it was error to exclude a defendant's poetry because it constituted

mitigation. (*People* v. *Harris*, 36 Cal.3d 36, 67-71 (1984) (plurality).)

In contrast, *Booth* and *Gathers* prevent the prosecution from presenting evidence about the victims or arguing the humanity of the victims and thus fully exposing the jury to the actual harm resulting from the defendant's act. Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced. (*Booth*, *supra*, 482 U.S. at p. 520 (Scalia, J., dissenting).)

The instant case exemplifies the inequity. Payne introduced the testimony of a friend from "church" who characterized him as a very caring person who helped get her life in order. Payne's friend offered that he was not an abuser of drugs or alcohol and it was inconsistent with his character to have committed these offenses. Payne's parents both testified to his good character and a clinical psychologist testified Payne was "mentally handicapped." (*State* v. *Payne*, 791 S.W.2d 10, 17 (Tenn. 1990).) In contrast, the State asked a single question about the effect Payne's crime had on Nicholas Christopher, who was himself a victim of Payne's brutality.[5] This, petitioner claims, constituted the

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[5]The following question serves as the basis for petitioner's claim:

"Q. Ms. Zvolanek [Nicholas's grandmother], how has the murder of Nicholas's mother and sister affected him?
"A. He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandma, do you miss my Lacie.

(continued...)

violation of *Booth*. The Tennessee Supreme Court below characterized the inequity of *Booth* and *Gathers* by stating:

> "It is an afront (sic) to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims." (*State* v. *Payne*, *supra*, 791 S.W.2d at p. 19.)

Another example clearly illustrates the unfairness of the current rule. A defendant may introduce testimony from a member of the victim's family, who for religious or other reasons, urges the jury to spare defendant's life. Trial courts feel compelled under *Lockett* and *Skipper* to allow such testimony. However, should the prosecution wish to rebut such testimony with victim impact evidence from other family members who do not share the desire to spare the defendant's life (even without expression of their opinion on the question of punishment), such evidence may be inadmissible under *Booth*.

The Court should permit the States and Congress to allow each party an equal opportunity to address the issue of appropriate punishment. If the penalty is constitutional, as the Court has repeatedly held, it cannot be unconstitutional to permit the pros and cons in the particular case to be heard. (*Booth*, *supra*, 482 U.S. at pp. 520-521 (Scalia, J., dissenting).)

And I tell him yes. He says, I'm worried about my Lacie." (State Transcript pp. 1504-1505.)

C. Evolving Societal Standards Allow Victim Impact

Other considerations which help give meaning to the Eighth Amendment are "the evolving standards of decency that mark the progress of a maturing society." (*Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (opinion of Warren, C.J.); *Gregg* v. *Georgia*, *supra*, 428 U.S. at p. 173 (opinion of Stewart, Powell, and Stevens, JJ.).) Whether by legislation or initiative, numerous states and the federal government have provided a mechanism whereby victims of crime and their families have a place in the criminal justice system. (See, *Booth*, *supra* at p. 509, fn. 12.)[6]

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[6]On June 8, 1982, the People of the State of California amended the state constitution by passing Proposition 8, "The Victims' Bill of Rights." (Cal. Const., art. I, § 28.) In article I, section 28, subdivision (a), the California Constitution now reads:

"The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is a matter of grave statewide concern.

"The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts, but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance.

"Such public safety extends to public primary, elementary, junior high, and senior high school campuses,

(continued...)

This legislative change is a response to a perception by society that the criminal justice system has meticulously respected the rights of a criminal defendant and expanded those rights, all the while ignoring the rights of the victim. The holding in *Booth* and its application in *Gathers* is the ultimate slap in the face to society and the survivors of the victim. Through those decisions, the victim is not treated as the uniquely individual human being he or she was, but as a member of a faceless, undifferentiated mass known as "victim." (Compare, *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.).) To strip victims of their dignity and humanity by relegating them to objects of no great significance is in violation of standards of decency. Consequently, evolving community standards cut strongly in favor of the elimination of *Booth* and *Gathers*.

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where students and staff have the right to be safe and secure in their persons.

"To accomplish these goals, broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives."

California Penal Code section 1191.1 is a consequence of Proposition 8. Section 1191.1 gives a crime victim, or certain members of the victim's family if the victim is a child or deceased, a right to attend and be heard at criminal sentencing proceedings in non-capital cases. (See, *People* v. *Siripongs*, 45 Cal.3d 548, 585-586, (1988) fn. 12.)

As recognized by the Court in *Booth*, the vast majority of States and the federal government have legislation which permits the use of victim impact information in some contexts. (*Booth*, *supra*, 482 U.S. at p. 509, fn. 12.) Without question, society has evolved to the point where victims have rights in the criminal justice system.

D. <u>The Confusion Caused By Booth and Gathers Justifies Overruling Those Decisions</u>

Booth should be overruled because the holding is so broad as to defy consistent application. *Booth* involved a minutely detailed, statutorily required Victim Impact Statement (VIS) which was presented to the jury. The VIS described the personal characteristics of the victims, the impact of the crimes on their surviving family, and included the family members' opinions and characterizations of the crimes and defendant. (*Booth*, *supra* at pp. 502-503, 509-515.)

In footnote 10 of the opinion (*Booth*, *supra* at p. 507), the Court stated that general disapproval of victim impact statements in a capital sentencing proceeding did not mean such evidence would never be relevant. Victim impact information could be admissible because it relates directly to the circumstances of the crime. It might be admissible where the victim's personal characteristics are relevant to rebut an argument offered by the defendant. (*Ibid.*) Thus, *Booth* presents a rule of exclusion with a potential plethora of exceptions and little guidance on the boundaries of the rule. In the short time since *Booth* was decided, it has already caused great confusion.

Notwithstanding footnote 10 in *Booth*, the Court in *Gathers* refused to uphold comments by the prosecutor about the victim of a crime even though those comments were based on evidence about the victim and his background which was properly admitted before the jury. *Gathers* appears to have extended *Booth* to prohibit discussion of admissible trial evidence. The result is plainly inconsistent with footnote 10 of *Booth* because the argument was directly related to the circumstances of the crime. Thus, *Gathers* added to the confusion created by *Booth* by prohibiting that which *Booth*, in footnote 10, appeared to expressly permit.

State v. *Huertas*, *supra*, 553 N.E.2d 1058, is itself

an example of the confusion caused by *Booth*. Chief Justice Moyer of the Ohio Supreme Court stated, "The fact that the majority and two dissenters in this case all interpret the opinions and footnotes in *Booth* and *Gathers* differently demonstrates the uncertainty of the law in this area." (*State* v. *Huertas*, *supra*, 553 N.E.2d at p. 1070 (Moyer, C.J., concurring).) Justice O'Connor's dissent in *Gathers* presented additional examples of the confusion begat by *Booth*. (*Gathers*, *supra* at p. 813 (O'Connor, J., dissenting).) Another graphic example is provided by the California Supreme Court, which held it was error (albeit harmless) to admit evidence of the impact of a murder on the victim's family where the victim was killed because the defendant wanted the victim's wife to suffer because of her professional status and professional relationship with the defendant. (*People* v. *Clark*, 50 Cal.3d 583, 612, 629 (1990).)

The inability to accurately define the rule has caused lower courts to give an overly expansive meaning to *Booth* which makes rational application of the rule perplexing, if not impossible. A rule of constitutional law which breeds confusion or peculiar results should be overruled. (*Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986).) *Booth* created such a rule.

E. The Concerns Underlying The Booth Decision Did Not Warrant The Establishment Of The Rule Nor Do They Support Its Retention

1. Victim Characteristics

The *Booth* Court was troubled by the implication that defendants whose victims were "assets" to their community are more deserving of punishment than those whose victims are perceived to be less worthy. (*Booth*, *supra*, 482 U.S. at p. 506, fn. 8.)

To the extent the Court was concerned a

sentencing body would be encouraged to rely on unconscionable factors such as race, religion or political affiliation of the victim in the sentencing decision, such concern is unwarranted. Without question the State may not rely on such factors in determining whether the death penalty is appropriate for the same reasons the State may not urge the death penalty because of the race, religion or political affiliation of the defendant. (*Zant* v. *Stephens*, *supra*, 462 U.S. at p. 885; *Gathers*, *supra*, 490 U.S. at pp. 821-822 (O'Connor, J., dissenting).)[7]

Contrary to the majority's analysis in *Booth*, there is reason to conclude some murders are more harmful to society than others. While on one level society is diminished equally by the loss of any human life, on another, more concrete level, the harm and disruption to society may be greater depending upon who is killed. For example, the harm to society by the assassination of the President of the United States, the murder of a teacher, a parent of twelve or a young child is immeasurably greater than the harm to society caused by the murder of a drug dealer in a dope deal gone sour.

Certainly the killer of the President, who has caused the country to come to halt, created potential national security problems, and has disenfranchised many voters has caused more harm and deserves greater moral condemnation than one who kills an ordinary citizen, even though both murders were premeditated and carried out under identical circumstances.

Additionally, under California law the status of the victim is an element of many special circumstances

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[7]This situation differs from a statute which allows imposition of the death penalty where the defendant commits an *intentional killing because* of the victim's race, color, religion, national origin or other similar factor. (See, Cal. Pen. Code, § 190.2, subd. (a)(16).)

used to limit the category of first degree murderers eligible for the death penalty. For example, special circumstances include intentional killing of a federal law enforcement officer, fireman, or a peace officer while engaged in the performance of his duties. (Cal. Pen. Code, §§ 190.2, subd. (a)(7)-190.2, subd. (a)(9).) Other special circumstances relate to the killing of a prosecutor, judge or elected or appointed official where the killing was carried out in retaliation for or to prevent the performance of the victim's official duties. (Cal. Pen. Code, §§ 190.2, subd. (a)(11)-190.2, subd. (a)(13).) These special circumstances in turn are circumstances of the crime relating to the victim that are considered by the jury in making the penalty determination. (Cal. Pen. Code, § 190.3, subd. (a).)

If *Booth* were carried to its extreme these special circumstances and others like them, which were designed to protect persons from becoming victims because of their position and because of the special outrage that arises from these murders, could be brought into question because they relate to characteristics of the victim. However, the Court's prior decisions never suggested such a result. (*Roberts* v. *Louisiana*, 431 U.S. 633, 636 (1977) (". . . the fact the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance.") While it may be possible to distinguish between a victim's status as a police officer and other facts, the constitutional basis for drawing such distinctions is difficult to discern.

2. **Defendant's Intent**

Another concern of the *Booth* majority pertained to blameworthiness as it relates to the defendant's intent. The Court stated the defendant often will not know the victim or have any knowledge of the characteristics of his/her family. Therefore, matters pertaining to the

victim do not relate to the defendant's blameworthiness. (*Booth*, *supra*, 482 U.S. at pp. 504-505.) However, as argued in some detail above, there is nothing that offends sensibilities by holding a murderer accountable not only for his/her state of mind, but for the full extent of harm caused. (See, *Booth*, *supra* at p. 516 (White, J., dissenting.)

For example, though they share identical intents, one who drives while under the influence and kills someone in a traffic accident faces a more severe moral judgment and criminal punishment than one who simply drives under the influence. Similarly, one who purposefully sets fire to a barn and unintentionally kills two people in the barn is subject to graver punishment and moral judgment than one who purposefully burns an empty barn. In these circumstances, and many others, the criminal law looks at the actual consequences of the act, not just the knowledge or intent of the defendant. (See, *Tison* v. *Arizona*, 481 U.S. 137, 150-151 (1987) (although defendants did not kill or intend to kill, their "reckless indifference" to human life allowed imposition of the death penalty).) Given this reality, there is no compelling reason why a trier of fact in a capital case should not be allowed to consider the impact on the victim, his or her family, and society caused by a murder regardless of defendant's knowledge or intent.

Of course, defendant's intent should not be ignored. If the defendant intended to murder because of knowledge of the victim and his/her family that may aggravate the case further. Likewise, if he did not intend such harm to occur, he may argue his lack of intent as a circumstance in mitigation. However, intent to harm is not a predicate for aggravation.

3. Defendant's Inability To Rebut Victim-Impact Evidence

Another concern of the Court involved a defendant's difficulty in successfully rebutting victim impact evidence because it might not sit well with the trier of fact. (*Booth*, *supra*, 482 U.S. at pp. 506-507.) The fact it might not be prudent to rebut victim impact evidence for tactical reasons is not a justification for making the evidence inadmissible, nor does it diminish its probative value. If a defendant chooses not to rebut it for tactical reasons that is his choice. The Constitution does not shield a defendant from making difficult choices. (*McGautha* v. *California*, 402 U.S. 183, 213 (1971).) So long as a defendant is given an opportunity to rebut the evidence, there is no constitutional infirmity to the admission of the evidence. (*Gardner* v. *Florida*, 430 U.S. 349, 362 (1977) (opinion of Stevens, J.).)

The prosecution is faced with a similar problem in a penalty trial and the Court has not expressed the same concern. In many capital cases the defense will call the defendant's mother or father to tearfully describe defendant's difficult life and beg the jury to spare defendant's life. Often the prosecution, for tactical reasons, does not cross-examine the parent for fear of a negative impact on the jury. Thus, the fact the defendant has difficult choices to make in rebutting evidence simply places him in the same position as the State. (See, *Booth*, *supra* at p. 518, fn. 3 (White, J., dissenting).)

4. The Mini-Trial

The *Booth* Court also expressed concerns that a mini-trial involving victim impact would be "unappealing" and would distract the jury from its task of determining the appropriate penalty. (*Booth*, *supra*, 482 U.S. at p.

507.) While litigation involving victim impact might be "unappealing," there is no portion of a capital trial which is appealing. Unpleasantness is inherent in the crime and its consequences.

The concern that the jury would be distracted from its proper goal by the introduction of victim impact evidence is based on a false assumption. The Court assumed victim impact evidence was irrelevant and thus a distraction. However, if the legislative body has determined that victim impact evidence is relevant to a jury's penalty decision, its introduction would not be a distraction, but an important consideration for the jury. Introduction of victim impact evidence, even if unrelated to the historic circumstances of the offense, causes no more distraction than a defendant's introduction of character evidence.

Once the legislature has defined the permissible boundaries of victim impact evidence the trial court is empowered to ensure the evidence is not too far removed from these issues. (See e.g. *Lockett* v. *Ohio*, *supra*, 438 U.S. at p. 604, fn. 12 (State courts maintain the traditional authority to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of the offense); see Cal. Evid. Code, §§ (Irrelevant evidence is inadmissible).)[8]

Even if prosecutors are permitted to introduce victim impact evidence in the penalty phase, tactical considerations will play a major role in circumscribed use of such evidence. As the majority recognized in *Booth*, discussions of victim impact may be unappealing. By

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[8]California courts also have the discretion to exclude evidence that is relevant if its probative value is substantially outweighed by the probability that its admission will necessitate the undue consumption of time or create substantial danger of prejudice, confusing the issues, or misleading the jury. (Cal. Evid. Code, § 352; see, Fed. Rules of Evid., rule 403.)

placing too much emphasis on victim impact, a prosecutor may end up with a hostile jury. Juries come into a penalty trial aware that a brutal murder likely had a devastating impact on surviving family members and possibly on the community. (See, *Booth*, *supra* at p. 508 (jurors aware of grief and anger of family).) A disproportionate emphasis on these facts may alienate the jury by dwelling on the obvious.

To have stated this proposition is not to suggest such evidence (or argument based on these factors) should be inadmissible. On the contrary, because jurors *are* aware of these facts evidence and argument about victim impact *should* be admissible. If jurors think about such things, the parties should be permitted to address these factors with evidence and argument. Only by bringing these issues into the open can the trial court regulate the process to insure information is properly considered by the jury. In so doing, the accuracy of the penalty process is enhanced.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that *Booth* and *Gathers* should be overruled because they have precluded penalty phase jurors from considering information which directly relates to the extent of harm caused by defendant's acts. "We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision." (*Gregg* v. *Georgia*, *supra*, 428 U.S. at p. 205 (opinion of Stewart, Powell, and Stevens, JJ).)

As Justice Blackmun was moved to observe in his dissenting opinion in *Furman* v. *Georgia*, *supra*, 408 U.S. at pp. 413-414:

"It is not without interest, also, to note that, although the several concurring opinions acknowledge the heinous and atrocious character of the offenses committed by the petitioners, none of those opinions makes reference to the misery the petitioners' crimes occasioned to the victims, to the families of the victims, and to the communities where the offenses took place. The arguments for the respective petitioners, particularly the oral arguments, were similarly and curiously devoid of any reference to the victims. There is risk, of course, in a comment such as this, for it opens one to the charge of emphasizing the retributive. (Citation.) Nevertheless, these cases are here because offenses to innocent victims were perpetrated. This fact, and the terror that occasioned it, and the fear that stalks the streets of many of our cities today perhaps deserve not to be entirely overlooked . . ."
(Emphasis added.)

DATED: April 2, 1991.

Respectfully submitted,

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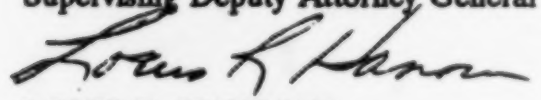

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CERTIFICATE OF SERVICE BY MAIL

NO. 90-5721

PERVIS TYRONE PAYNE, Petitioner,

v.

STATE OF TENNESSEE, Respondent.

LOUIS R. HANOIAN, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 110 West A Street, Suite 700, San Diego, California, 92101; that on April 4, 1991, he caused to be served a true copy of the attached Brief of the State of California, joined by the states of Alabama, Arizona, Colorado, Connecticut, Florida, Indiana, Kentucky, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota and Washington, as Amici Curiae in the above-entitled matter, on counsel for petitioner and counsel for respondent by placing same in an envelope addressed as follows:

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Said envelope was then sealed and deposited in the United States mail at San Diego, California, with the postage thereon fully prepaid.

LOUIS R. HANOIAN
Deputy Attorney General

Subscribed and sworn to before me this 4th day of April, 1991.

Notary Public in and for said County and State

ANNE MARIE BUFORD
Notary Public—California
County of San Diego
My Commission Expires 11/19/93